

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Children’s Television Programming)	MB Docket No. 18-202
)	
Modernization of Media Regulation)	MB Docket No. 17-105
Initiative)	
)	

COMMENTS



The American Cable Association (“ACA”) hereby submits these comments in response to the Federal Communications Commission’s (“Commission”) Notice of Proposed Rulemaking on Children’s Television Programming (“NPRM”).¹ ACA’s comments are limited to the Commission’s proposal to reduce recordkeeping burdens on cable operators. Specifically, the Commisison proposes to permit cable operators to place in their online public inspection files records demonstrating compliance with the

¹ *Children’s Television Programming*, Notice of Proposed Rulemaking, FCC 18-93, MB Docket Nos. 18-202; 17-105 (rel. Jul. 13, 2018) (“NPRM”).

limits on commercial matter in children's programming once a year, rather than on a quarterly basis,² as is required by the current rules.

As ACA has previously explained, recordkeeping requirements for children's commercial limits are burdensome for cable operators,³ in large part because cable system operators have just ten days to collect the necessary certifications from dozens of programmers who typically wait until the last minute to produce them (and in some cases elect to not provide them at all). ACA therefore encourages the Commission to mitigate this burden by adopting its proposal to reduce the frequency with which cable operators must collect and post the necessary documentation. Further, ACA proposes that the Commission provide additional relief by increasing the amount of time after the end of a reporting period that cable operators have to collect and post programmer certifications, and by making clear that the Media Bureau will not adopt an official Notice of Apparent Liability for Forfeiture against a small or medium-sized cable operator regarding its compliance with its recordkeeping obligations if it can show its made good faith efforts to collect and post all necessary certifications. Taking these steps will reduce unnecessary regulatory burdens without in any way compromising the important substantive limits on commercial matter aired during children's programming.

Section 76.1703 of the Commission's rules requires cable operators to "maintain records sufficient to verify compliance with § 76.225 and make such records available to

² NPRM, ¶ 30.

³ See Letter from Mary C. Lovejoy, Vice President of Regulatory Affairs, American Cable Association, to Marlene H. Dortch, Secretary, FCC, MB Docket Nos 18-202 and 17-105 (Jul. 2, 2018); see also *Modernization of Media Regulations Initiative*, MB Docket No. 17-105, Comments of the American Cable Association at 17-18 (filed Jul. 5, 2017).

the public.”⁴ The Commission has interpreted this obligation to mean that cable operators must post in their online public inspection files either a list of the number of commercial minutes per hour aired during identified children's programs, or certified documentation that each programming network carried by the operator, as a standard practice, formats and airs identified children's programs within limits established by the Children's Television Act of 1990.⁵

Collecting such documentation from programming networks is onerous.⁶ ACA members carry dozens, if not hundreds, of individual networks operated by dozens of unique programming groups.⁷ While some program groups provide a single document that covers all of their networks, most create separate documents for each network, such that cable operators are responsible for tracking down, collecting, and processing well over one hundred individual files.⁸

For most operators, this process begins days, or even weeks, prior to the end of each quarter, during which time they reach out to programmers to remind them of the recordkeeping requirement and to ask that they provide the necessary certifications or program lists as soon as possible.⁹ Most programmers do not send their documentation

⁴ 47 C.F.R. § 1703.

⁵ *Policies and Rules Concerning Children's Television Programming; Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, Memorandum Opinion and Order, 6 FCC Rcd 5093, ¶ 22 (1991) (“Children’s Television Programming Order”), citing *The Children’s Television Act of 1990*, Pub. L. 101-437, 104 Stat. 996.

⁶ See Declaration of Teena Madden, Programming and Projects Coordinator, Vyve Broadband (Attached as Exhibit A) (“Madden Declaration”).

⁷ Some programming groups provide a single document that covers each of their networks, while others provide separate certifications or program lists for each network.

⁸ See *generally* Madden Declaration.

⁹ *Id.*, ¶ 1.

to cable operators directly, but rather they make their certificates or program lists available for download on a website accessible to cable operators with whom they have a carriage agreement.¹⁰ Moreover, many programmers do not make their documents available until very close to the date that cable operators are required to post them to their online public file.¹¹ A few wait until the very last day, and some even provide them after the deadline has passed or do not provide them at all.¹² While a few programmers will inform a cable operator that the documentation has been posted if specifically asked each quarter, most do not, so it is up to the cable operator to visit each site on their own initiative.¹³

As such, operators must spend time every day trying to track down programmers' certifications, beginning at the end of the quarter until the documents have been provided.¹⁴ Specifically, it means spending time checking and re-checking programmers' websites, as well as attempting to communicate with them via telephone and/or email to inquire after their status.¹⁵ It also means a last-minute scramble for the cable operator to process and post those certificates to the cable operator's online public inspection file. Finally, it creates a significant risk of non-compliance if the cable operator is unable to obtain all of the necessary documents in time. All in all, ACA

¹⁰ *Id.*, ¶ 4.

¹¹ *Id.*

¹² *Id.*, ¶ 3.

¹³ *Id.*, ¶ 4.

¹⁴ *Id.*, ¶ 6.

¹⁵ *Id.*, ¶¶ 6-8.

members report spending 16 to twenty 20 per quarter – a total of 64 to 80 hours per year – attempting to collect the necessary documents.¹⁶

The Commission can and should take several steps to alleviate these burdens. First, the Commission should adopt its proposal to require cable operators to post their children's programming certifications and program lists on an annual basis, rather than every quarter. This would reduce the man-hours necessary to comply with the obligation by a full 75 percent, providing much needed relief for small operators who cannot afford to divert limited human resources to this task every quarter.

Second, the Commission should extend the deadline for cable operators to post the necessary documents to 45 days after the end of the quarter during which the programming aired.¹⁷ As explained above, cable operators find it extremely difficult to collect certifications from each programmer within ten days because most programmers take at least a week or more to post their certifications on their websites.¹⁸ Extending the deadline would allow cable operators to wait until the majority of programmers have posted their certificates and program lists prior to their collection, eliminating the need to repeat the search every day, and thereby further reducing the number of man-hours devoted to this task. It would also help reduce the risk that a programmer will not make

¹⁶ *Id.*, ¶ 11.

¹⁷ There is precedent for Commission reporting or recordkeeping requirements whose submission deadlines extend well past the period for which the data is collected. *See Reform of the FCC Form 477 Data Program*, Public Notice, DA 18-716, WC Docket No. 11-10 (rel. Jul. 11, 2018) (requiring the submission of Form 477 data from a period ending more than two months prior to the submission deadline).

¹⁸ A programmer cannot properly certify as to its programming practices for a given quarter until that quarter has been completed, so there is no way for a cable operator to begin its collection process early in attempt to save time.

their documents available in a timely manner,¹⁹ thereby forcing cable operators to violate the Commission's rules, despite their best efforts.

Finally, the Commission should make clear that the Media Bureau will not adopt an official Notice of Apparent Liability for Forfeiture against any small or medium-sized cable operator for violating the children's programming recordkeeping requirement if that operator can demonstrate in response to a Bureau inquiry that it made a good faith effort to collect and post to their online file all necessary programmer certificates and program lists by the Commission's deadline.²⁰ Small cable operators, who have little to no influence over the actions of programmers,²¹ should not be held responsible for not including certifications in their public file from programmers who do not make available by the 10-day filing deadline a certification to an operator that took efforts to obtain it.

The steps outlined above would in no way impact the underlying substance of the limits on commercial matter in children's programming, nor would they increase the risk that children will be exposed to harmful material. Cable operators would remain liable

¹⁹ ACA takes no position on the appropriateness of extending the time for broadcasters to post their certifications, but highlights broadcasters are more likely to have in their possession at the start of the 10-day timeline all the information they typically include in their submission, whereas cable systems operators are dependent on obtaining from separately owned programmers the information they typically include their public files.

²⁰ ACA recognizes that the Media Bureau will conduct an inquiry into an alleged violation of the children's programming recordkeeping requirements prior to initiating a Notice of Apparent Liability for Forfeiture against a small or medium-sized cable operator. The Bureau has broad discretion, however, in the way it conducts such an inquiry. To the extent that the Bureau does inquire into an apparent violation of any kind, the Commission should encourage it to make its inquiry in a way designed to limit the burden on the operator, for example by contacting the operator via telephone or email to discuss the operator's efforts to comply with the rule and seek no more information than necessary to determine whether a small or mid-sized cable operator has made an obvious attempt to post children's programming certifications for a majority of the programming networks the operator carries in a timely manner. See 47 C.F.R. § 1.80 (listing "good faith" compliance efforts as a downward adjustment criteria in potential forfeiture actions).

²¹ Cable operators generally have a provision in their programming contract that requires programmers to provide the necessary documentation, but they have no means of enforcing that requirement.

for violations of Section 76.255, and would still require programmers to certify that they are in compliance with the limits outlined in the Children's Television Act. The Commission has never provided a clear policy rationale for requiring cable operators or broadcast stations to provide documentation regarding commercial limits in children's programming every quarter, other than explaining that a quarterly requirement would be "analogous to" another unrelated, previously existing requirement that broadcasters post a description of community issues that they gave significant treatment and a list of the programming that provided this treatment in their public file each quarter.²² The Commission did not explain why these two obligations should be considered analogous, but whatever its rationale at the time, there is no good reason to continue coupling these unrelated requirements together, particularly for cable operators who have never been subject to the broadcaster obligation. Further, while a quarterly reporting obligation might have been helpful in initially monitoring cable operators compliance with the rule, cable operators have now been subject to the children's television rules for more than two decades, during which time there have been very few violations of the substantive limits on commercial matter in children's programming on the part of cable networks. There is no longer any need for the Commission to monitor cable operators compliance so closely.²³ There is also no evidence that the Commission or the public

²² See Children's Television Order, ¶ 23, *citing* 47 C.F.R. § 73.3526(a)(8) (the Code of Federal Regulations has since been updated, such that the broadcast TV issues/programs lists requirement may be found at 47 C.F.R. § 73.3526(e)(11)(i)).

²³ In fact, in a 2012 review of cable and satellite compliance with the children's programming limits, Enforcement Bureau staff "recorded and reviewed programming from children's programming networks," which was then "analyzed for compliance with commercial limits as well as the prohibitions on host selling, program-length commercials, and the display of commercial website Internet addresses." *Enforcement Bureau Reports on Cable and Satellite Compliance with Children's Programming Requirements Under the Children's Television Act and Associated Public File Rules*, Public Notice, 27 FCC Rcd 8066 at 3 (2012). Despite identifying several instances where cable operators had not met their

access cable operators' public file on a quarterly basis for purposes of reviewing the programmers' certification. Finally, there is ample justification to make the change. The additional procedural changes proposed herein would serve to reduce regulatory pressures, particularly on small cable operators who have little or no control over the programmers' actions.

For these reasons, ACA encourages the Commission to adopt its proposal to reduce cable operators children's programming recordkeeping requirements from quarterly to annually, to extend the deadline for posting necessary documentation from ten days after the end of the reporting period to 45 days, and to make clear that the Media Bureau will not adopt an official Notice of Apparent Liability for Forfeiture against any small or medium-sized operator that can demonstrate it has made a good faith effort to comply with the rule in response to an inquiry. At the very least, the Commission should adopt these proposals for small and medium-sized operators, as the majority of cable operators carry most of the same programming, and therefore post mostly identical documents in their online public inspection files. Thus the Commission could still ensure that children's programming on cable networks complies with the substantive limits on commercial material by reviewing documentation posted only by larger operators.

recordkeeping requirements, "[t]he Bureau's review of children's programming material revealed no violations of the limits on commercial matter." *Id.* Thus, there was no correlation between compliance with the recordkeeping obligations and compliance with the underlying substantive limits on commercial programming.

Respectfully submitted,



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September 24, 2018

Exhibit A

**Before the
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DECLARATION OF TEENA MADDEN

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PROGRAMMING AND PROJECTS COORDINATOR – VYVE BROADBAND

1. My name is Teena Madden. I am the Programming and Projects Coordinator at Vyve Broadband ("Vyve"). My business address is 1819 Airport Dr., Shawnee, OK 74802. Vyve Broadband is a mid-sized cable operator that provides multichannel video programming distribution ("MVPD") services to subscribers in 8 states. Across all systems, Vyve provides 134 individual cable programming networks to customers.

2. In my role as Programming and Projects Coordinator, among other duties, I am responsible, in part, for ensuring that Vyve complies with Section 76.1703 of the Federal Communication Commission's Rules, which requires cable operators to "maintain records sufficient to verify compliance with §76.225 and make such records available to the public."¹ This has been among my responsibilities since 2010, although at that time I was employed by Allegiance Communications, LLC. ("Allegiance"). My employment with Vyve began in 2013, when Vyve purchased several cable systems from Allegiance.

3. To comply with this rule, Vyve asks each of its cable programming networks to provide documentation every quarter that they abide with the limits on commercial matter in children's programming established by the Children's Television Act of 1990. Most programmers provide a signed statement certifying that they abide by those limits, or that they carry no children's programming at all. A few programmers will claim that they do not need to provide such certification because they do not air any children's programming. Vyve still asks these programmers to provide such certification, but cannot force them to do so if they refuse.

4. Most programmers post downloadable files containing their certifications to a website that can be accessed by cable operators. These programmers typically upload their documents to their websites only a few days before Vyve must post them in its public file. Some programmers will notify me when their certifications are posted online if requested, or will send

¹ 47 C.F.R. § 76.1703.

me the certifications directly via email. Vyve posts all of the collected documents to its online public inspection file for each of cable systems with greater than 1,000 subscribers within 10 days of the end of the previous quarter, as required by existing rules.

5. I maintain a spreadsheet with a list of each of the 134 cable programming networks carried by Vyve, which I use to keep track of who has provided their certification and who has not. My process begins by reaching out to each programming network that Vyve carries roughly two weeks before the end of each quarter, asking them to send me their children's programming certifications, or to notify me as soon as they are available for download on the programmer's affiliate website. I send a second email reminder to each programmer once the quarter has ended.

6. Because I have so many certifications to collect and process, and because the consequences to Vyve for failure to post all certifications within 10 days of the end of the quarter could be severe, I cannot afford to assume that programmers will provide their certifications on time without keeping close track and following up directly with those who have not done so within a few days of the deadline. I therefore begin checking each programmer's affiliate website on a daily basis starting on the first day of the quarter to see if their children's programming certification has been posted. I visit 44 different programmer websites for this purpose.

7. Whenever I find that a programmer has posted a certification, (or when they have delivered such certification to me directly), I download the file, save it for later processing, and make a note on my spreadsheet that I have received it. Each day I go through the list, and visit the affiliate website of every programmer for whom I do not yet have a certification.

8. Roughly 3 days before the deadline for posting the certifications, I will once again send an email reminder to any programmers that have not yet provided their certifications. Most programmers provide their certifications roughly 2 to 3 days prior to the deadline, but each quarter there are at least a few that wait until the last possible day. In some cases I make calls

to programmers in the last couple of days to ask them to provide their certifications or to explain why they refuse to do so. To ensure that Vyve complies fully with the rules, I make every effort to get some response from all programmers every quarter, even those who state that they are not obligated to provide a certification because they do not air any children's programming.

9. In the ten days after the end of the quarter, I also regularly visit the member website for the National Cable Television Cooperative ("NCTC"), a buying group that negotiates carriage agreements for much of the programming that Vyve carries. As a courtesy to its members, NCTC collects children's programming certifications from the programmers with whom they have agreements. NCTC makes the certifications that it collects available for NCTC members to download. I am able to use NCTC's resources to help with my collection efforts, but I cannot rely solely on NCTC for several reasons. First, NCTC does not get access to children's programming certifications any sooner than any cable operators. Since NCTC gets the certifications themselves often at the last minute, NCTC typically does not post any children's programming certifications until at least two or three days prior to the compliance deadline. NCTC will then update their files as additional certifications are made available. Because I am concerned about having sufficient time to reach out to missing programmers or to process and post the certifications that I do have, NCTC's efforts are only minimally helpful in ensuring that I have not missed any programming networks that are already available. Second, we carry twenty-two programming networks with whom NCTC has no agreement, and therefore I must collect those networks' certifications myself.

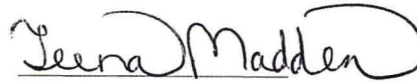
10. In addition to collecting the certifications, I am responsible for processing them and forwarding them to a colleague, who then uploads them to Vyve's online public inspection files. Whenever I find a certification on a programmer's website, I download it and save it to my computer. Once I have a batch of 20-30 certifications downloaded, I combine all of the files into a single pdf document, and send it to a colleague who is responsible for posting it to Vyve's public inspection files. I repeat this process whenever I have a new batch of 20-30

certifications. Once NCTC has posted their certifications to the NCTC member website, I download those documents to identify any certifications that I have not already compiled and distributed to my colleague. If I find any, I extract those certifications from the NCTC's batch and send them to my colleague. NCTC updates its files as new certifications come in, so I often have to repeat this process several times.

11. For the second quarter of 2018, Vyve posted 111 certifications for 134 programming networks in our online public inspection files. From beginning to end, I spent roughly twenty hours collecting and processing the certifications prior to sending them to my colleague to be posted.

12. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my information and belief.

Executed on September 24, 2018.

A handwritten signature in black ink that reads "Teena Madden". The signature is written in a cursive style with a large, looping "M" and a long horizontal stroke at the end.

Teena Madden